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In the Supreme Court of the United States

OCTOBER TERM, 1972

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, PETITIONER

v.

THE PUYALLUP TRIBE

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v.

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION (AMICUS CURIAE)

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INDEX

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1972

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CONSENT

This brief is filed with the consent of both parties.

STATEMENT OF INTEREST

The Confederated Bands and Tribes of the Yakima Indian Nation has an important interest in the outcome of this matter. It is evident from the granting of certiorari on petitions filed by both parties, that the power of states to regulate off-reservation Indian treaty fish-

eries is under serious review.[1] We are concerned that the facts of the instant case may produce a judicial determination that is contrary to reservation of Indian rights and residual Indian sovereignty or that should not be controlling in other areas.[2] We had in our first *brief amicus* informed the court that the Yakima Indian Nation, the largest recognized tribe in the State of Washington, in exercise of its reserved rights and residual sovereignty has regulated its off-reservation treaty fisheries for many years.[3] At the time of our first brief, the courts had never held in any of the many cases where Yakima Indians had been arrested by state authorities that Yakima members fishing in conformity with these regulations had impaired the fishery or that the state's regulations were "necessary for the conservation of the fishery". This is true today. The courts have still continued to find that Yakima members fishing in conformity with the Yakima Nation's conservation

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[1] Legal writers have suggested this is long overdue. See "The States versus Indian off-reservation Fishing: An United States Supreme Court Error", *Washington Law Review,* Volume 47, page 207 (1972).

[2] The Yakima Nation has retained 1,117,232.62 acres or 90% of its reservation in Indian ownership. It likewise maintains a strong tribal government, conservation practices enforcement officers and has a history of Tribal regulation of its treaty fisheries. A decision that would turn on facts showing a breakdown of tribal government and regulation should clearly indicate that it does not affect tribes like the Yakima Nation or those similarly situated. Statistics from Bureau of Indian Affairs Data.

[3] Reference is made to our brief filed March 1, 1968 in Docket 247, October Term, 1967. Attention to said brief is invited.

regulations were being illegally restricted by State action.[1] The Federal Courts have likewise upheld the arrest and conviction in tribal court of tribal members violating our conservation regulations at "usual and accustomed places" off the reservation.[2] When the court has ruled on the merits in these cases it held that it is an inherent tribal matter. The Yakima Nation now has a membership of over 6,000 members and it is estimated that 2,000 use the treaty fisheries — on and off the Yakima Reservation — to earn or supplement their livelihood.[3] In spite of this exercise of reserved treaty rights and though the United States in the council negotiating *The Yakima Treaty* promised economic parity with non-Indian neighbors, great economic dis-

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[1] *United States v. Oregon*, 304 F. Supp. 899 (D. Oregon 1969).

[2] *Alvin Settler v. Yakima Tribal Court*, Civil No. 2378, *Alvin Settler v. Wilson LaMeer, et al*, Civil No. 2454, *Mary Settler v. Wilson LaMeer, et al*, Civil No. 2453. Habeas corpus actions in Federal District Court, Eastern District of Washington, all unreported.

[3] Interrogatories of Louis Cloud, Yakima Tribal Council Fish Committee Chairman, in *U. S. v. Washington*, Docket Number 9213, Eastern District of Washington, 1972.

A survey in 1942 indicated that the annual family consumption was 1,611 pounds. Edward G. Swindell, *Report on Source, Nature, and Extent of the Fishing, Hunting, and Misc. Related Rights of Certain Indian Tribes in Washington and Oregon together with Affidavits Showing Location of a Number of Usual and Accustomed Fishing Grounds and Stations*, Division of Forestry and Grazing, Office of Indian Affairs, U. S. Department of Interior, Los Angeles, California, 1942, page 14.

Later data in 1957 indicated that 78% of the on reservation male members and 32% on reservation female members fished off reservation and landed approximately 1.7 million dollars at 1957 prices. *The Socio-Economic Status of the Yakima Nation*, Washington State University Stations Circular 397, 1961, page 31 et. seq.

partity still exists.[1] Continued exercise and expansion of this reserved treaty right to fish is necessary if the treaty negotiations promise to provide for a viable Indian community on the Yakima Reservation, are to be kept.[2]

ARGUMENT

The failure of the treaty provisions reserving the right to fish to specify the method or manner of fishing in the articles drawn by the United States should not be charged against the Indians. There is no more often repeated principle of Indian law than that language used in treaties with Indians should never be construed to their prejudice and that they should be interpreted as understood by these unlettered people rather than by their critical meaning.[3] To hold — that Indians

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[1] The annual median family income of the Yakima members is $4,940.00 with 23% of these families living on less than $2,000.00. The average per capita income is $1,100.00. This compares unfavorably with the median family income for all families in the State of Washington over $10,000.00 and the per capita income state wide of $4,148.00 and nationally of $4,156.00. Unemployment is 28% which compares unfavorably with the state figure of 8.9%. The median education level for those over 25 years is 10.1 years in comparison with the state median average of over 12 years. *Pocket Data Book,* Office of Program Planning and Fiscal Management, State of Washington 1972; *An Economic Analysis of the Labor Market for the Yakima Indian Nation,* Pacific Northwest Laboratories, Battelle, 1973.

[2] Record of Proceedings, Walla Walla Treaty Council, 1855.

[3] *United States v. Winans,* 198 U.S. 371 (1905); *Jones v. Meehan,* 175 U.S. 1 (1899); *Winters v. United States,* 207 U.S. 564 (1908); *Worcester v. Georgia,* 6 Pet. 515 (1832); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970).

exercising their reserved treaty right must use a hook and line — would virtually abrogate this accepted rule of treaty interpretation. This method was almost unused at treaty times.[1]

The doctrine of residual sovereignty of Indian tribes, and particularly with whom the United States made treaties, has been preserved in decisions to the present term.[2] The reserved right to fish at usual and accustomed places is a tribal rather than an individual right.[3] While it may be that Indians who are fishing without or in violation of tribal regulation are subject to state regulation,[4] Indians fishing in conformity with tribal conservation regulation should not be placed in the same category. Any state regulation of a tribally regulated fishery infringes on the right of Indian tribes to make their own laws and to be regulated by them.[5]

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[1] *Swindell, supra.*

[2] *McClanahan v. State Tax Commission of Arizona,* 41 LW 4457 (1973).

[3] *Whitefoot v. United States,* 293 F.2d 658 (Ct. Cl. 1961).

[4] The United States Attorney, Western District of Washington expressed the opinion in 1968 that an Indian fishing in violation of tribal ordinance is not correctly exercising the tribal treaty right and is therefore subject to state prosecution. See brief amicus in *Department of Game v. Settler,* Superior Court for Skamania County (1968). This court in its decision in *Puyallup* apparently is following this rationale. See also *State v. Gowdy,* 1 Ore. App. 424, 462 P.2d 461.

[5] Federal Judge Charles Powell, Eastern District of Washington in *Settler v. Yakima Tribal Court,* unreported, has held that it is within the inherent power of the Yakima Nation to arrest and punish fishing in violation of tribes conservation regulation at off-reservation fisheries. Copy filed with the clerk of this court.

States may not interfere with this right except where Congress has so provided.[1] Congress has not so provided. The Yakima Nation realizes that if they fail to accept this responsibility the Secretary of Interior may act under existing regulations, Congress may act, or fish runs will be reduced. The Yakima Nation fully intends to accept its responsibility for all of these alternatives would be a limitation of its reserved treaty right and residual sovereignty. These rights are important tribal rights. The Yakima Nation continues to exercise this right to allow for a treaty off-reservation fishery to provide for its members who find themselves — contrary to promises at treaty times — among the most deprived group of people in our nation. Just as important is the right and duty of the Yakima Nation to maintain these treaty fisheries for those Yakimas yet unborn. A treaty right in a non-existent fishery is no right at all. The Yakima Nation dedicates itself to the protection of these fisheries in spite of all the non-Indian caused handicaps of non-screened irrigation diversions, power dams, pollution, and spawning ground destruction.

Likewise the doctrine of federal pre-emption, preempts state regulation of tribal treaty off-reservation

[1] This court has so held in cases from *Worcester v. Georgia, supra* to *McClanahan v. Arizona Tax Commission, supra.*

fisheries.[1] Regulation of the Secretary of Interior provide that on his own motion, or upon the request of an Indian tribe or state governor, and upon the finding that there is a need for such regulation to assume the conservation and wise utilization of the resource; that off reservation fisheries may be regulated by the Federal Government.[2] No state has petitioned for such regulation nor has the Secretary found that such regulation is necessary to satisfy the aims of conservation or wise utilization of the off-reservation fisheries resource.

We do not believe that either the location of these treaty fisheries off-reservation or within the exterior boundaries of a state or the phrase "in common with" to be controlling in this cause. The reservation of these fisheries off-reservation took place many years before Washington was a state. A reservation exists and that is the reservation of the tribal right to fish.[3] Complementing this reserved right is the existence of residual sovereignty to regulate this right.[4]

The State of Washington should not be able to regulate the fishermen of the Yakima Indian Nation or

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[1] Again see *McClanahan v. Arizona Tax Commission, supra,* for discussion of this doctrine.

[2] 25 CFR Part 256 promulgated in 1967.

[3] *United States v. Winans, supra.* When the State of Washington was admitted to the Union, it accepted these reservations of rights.

[4] See footnote discussing *Settler v. Yakima Tribal Court, supra.*

those tribes similarly situated. The State of Washington can protect any legitimate interest they have in any Yakima off-reservation fishery. Among the options open to it are:

1. Work with the tribes involved to insure that the tribal regulations prescribe adequate protection of the fishery;[1]

2. Enter into an agreement with the Yakimas to provide for a joint regulatory board to regulate the fishery;[2]

3. Petition the Secretary of Interior to regulate the fishery if the conservation and the wise use of the fishery is not preserved;[3]

4. Petition Congress for legislation providing for delegation to the states of off-reservation Indian fisheries.[4]

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[1] We had the help of the State of Oregon agencies in the late sixties in this regard. It was very helpful. The Washington State Department of Fisheries is beginning to do this with tribes in the Puget Sound area.

[2] This form of regulation has existed on the Klickitat River since 1952 with the Department of Fisheries.

[3] Questions to the Department of Game would undoubtedly show that they would probably rather let the fisheries be impaired than to give up what they call their "prerogative".

[4] This was tried in 1964. A reading of the Hearings on SJR 170 and SJR 171, 88th Congress 2nd Session, August 5-6, 1964, will show why Congress was unimpressed. Also note that Public Law 83-280, (67 Stat. 588) reserves jurisdiction over treaty rights in the Federal Government and the tribes. Congress repeated its position in 1968. (Public Law 90-284).

CONCLUSION

The opinion in this case should clearly indicate that tribes maintaining a tribal government and a regulated tribal fishery should not be subject to state regulation.

DATED: June 22, 1973.

Respectfully submitted,

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